

Congress of the United States
House of Representatives
Washington, DC 20515-2107

DISTRICT OFFICES:

5 HIGH STREET, SUITE 101
MEDFORD, MA 02155
(781) 396-2900

188 CONCORD STREET, SUITE 102
FRAMINGHAM, MA 01702
(508) 875-2900
www.house.gov/markey

March 11, 2004

The Honorable Spencer Abraham
Secretary
Department of Energy
1000 Independence Avenue S.W.
Washington, D.C.
20585

Dear Mr. Secretary:

I am writing to request information regarding DOE policy and decisions related to recent legal settlements entered into by the University of California (UC) to end disputes brought against it for its activities as manager and operator of several national nuclear weapons laboratories.

As you know, the Department of Energy (DOE) reimbursed its contractors for \$249.4 million in litigation costs and \$81.1 million for judgments and settlements between 1998 and March 2003, while during that same period, contractors spent about \$12 million on such costs.

According to a report prepared at my request by the General Accounting Office (GAO), GAO-04-148R, it is DOE's policy to reimburse contractors such as UC for almost all litigation and settlement costs unless the costs were incurred as a result of willful misconduct, lack of good faith or failure to exercise prudent business judgment on the part of "managerial" personnel. However, DOE's definition of "managerial" personnel generally does not include the personnel named in most litigation or those who actually make decisions about how to pursue these cases. As a direct consequence of this policy, DOE often continues to reimburse its contractors for legal disputes that drag on for years in which judgment after judgment demonstrates the lab is clearly in the wrong, or for cases in which a whistleblower is forced to sue the lab for retaliation.

One glaring example of such a case is that of Dee Kotla, who alleged that she was retaliated against and ultimately fired by Lawrence Livermore National Lab (LLNL) in 1997 because she testified at a sexual harassment trial involving other LLNL personnel. LLNL reportedly said it fired Ms. Kotla for misuse of her computer and her telephone. However, according to reports on the matter Ms. Kotla only had \$4.30 in local telephone charges, and said that her use of her computer was minimal. According to DOE, it has reimbursed UC more than \$800,000 in the Kotla case, and may reimburse additional costs before the case is fully resolved.

I am concerned that if DOE fails to adequately assess the merits of the legal cases to which its contractors are a party, and instead reimburses contractors indiscriminately, these contractors will have little incentive to settle cases that are either frivolous or in which they are in the wrong. This could result in years of frustration and burdensome legal expenses for whistleblowers such as Ms. Kotla and other entities involved in legal actions with DOE contractors. It will also be a waste of taxpayer funds and could endanger public health and safety by having a chilling effect upon other potential whistleblowers. Consequently, I ask that you provide responses to the following questions:

General questions on DOE policy regarding reimbursement of contractor legal fees:

- 1) According to the GAO report, DOE withholds the reimbursement of legal fees only when they were incurred as a result of willful misconduct, lack of good faith or failure to exercise prudent business judgment on the part of *managerial* personnel. For the past 5 years, please list and describe the cases in which DOE refused to reimburse a contractor for any of these reasons.
- 2) Few contractor managerial personnel ever participate in specific decisions related to whistleblower litigation. Do you think that in the future, as a condition of reimbursement by DOE, managerial personnel should be required to personally review and approve all decisions to initiate or prolong litigation? Why or why not?
- 3) Few contractor managerial personnel are ever named directly in whistleblower, sexual harassment, wrongful termination and other employment-related lawsuits. For the past 5 years, please list and describe the cases in which *managerial* personnel were directly named in litigation for which DOE ultimately reimbursed legal fees in whole or in part.
- 4) According to the GAO report, UC officials estimated that the university used immunity-related defenses in at least 62 of about 137 cases from October 1998 through March 2003, and that in many such instances, the cases were dismissed as a result of these arguments. One of the arguments used by UC is that, as a state entity, it cannot be sued under the False Claims Act. However, the attached page from the UC website related to its contract with DOE states that it *is* subject to False Claims Act liability. If UC is claiming this immunity in court, do you believe it is therefore in violation of its contract with DOE? Why or why not?

Specific questions on litigation against laboratories managed and operated by UC:

- 1)
 - a) How much has been requested by LLNL for reimbursement in the Dee Kotla case?
 - b) How much has DOE agreed to reimburse LLNL in the Kotla case?

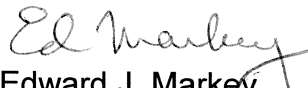
- c) How much has DOE refused to reimburse LLNL in the Kotla case? Has the lab paid these costs itself? Are there additional costs incurred by LLNL in this case that it did not request reimbursement for, and if so, how much was incurred by the lab?
 - d) Since this case has been highly publicized both in the press and at Congressional hearings, would you agree that the lab's managerial personnel have had every opportunity to determine whether continuing to refuse to settle with Ms Kotla would constitute a failure to exercise prudent business judgment?
 - e) On what basis has DOE decided to continue to reimburse LLNL in this case?
- 2)
 - a) How much has been requested by Los Alamos National Laboratory (LANL) for reimbursement in the Glenn Walp case?
 - b) How much has DOE agreed to reimburse LANL in the Walp case?
 - c) How much has DOE refused to reimburse LANL in the Walp case? Has the lab paid these costs itself? Are there additional costs incurred by LANL in this case that it did not request reimbursement for, and if so, how much was incurred by the lab?
 - 3)
 - a) How much has been requested by Los Alamos National Laboratory (LANL) for reimbursement in the Steve Doran case?
 - b) How much has DOE agreed to reimburse LANL in the Doran case?
 - c) How much has DOE refused to reimburse LANL in the Doran case? Has the lab paid these costs itself? Are there additional costs incurred by LANL in this case that it did not request reimbursement for, and if so, how much was incurred by the lab?
 - 4)
 - a) How much has been requested by LLNL for reimbursement in the Michelle Doggett case?
 - b) How much has DOE agreed to reimburse LLNL in the Doggett case?
 - c) How much has DOE refused to reimburse LLNL in the Doggett case? Has the lab paid these costs itself? Are there additional costs incurred by LLNL in this case that it did not request reimbursement for, and if so, how much was incurred by the lab?
 - 5)
 - a) How much has been requested by LLNL for reimbursement in the Singleton et al case?
 - b) How much has DOE agreed to reimburse LLNL in the Singleton et al case?
 - c) How much has DOE refused to reimburse LLNL in the Singleton et al case? Has the lab paid these costs itself? Are there additional costs incurred by LLNL in this case that it did not request reimbursement for, and if so, how much was incurred by the lab?

- 6)
 - a) How much has been requested by LLNL for reimbursement in the case brought against it by the Department of Justice that was recently settled for \$3.9 million?
 - b) How much has DOE agreed to reimburse LLNL for this case?
 - c) How much has DOE refused to reimburse LLNL for this case? Has the lab paid these costs itself? Are there additional costs incurred by LLNL in this case that it did not request reimbursement for, and if so, how much was incurred by the lab?

- 7)
 - a) How much has been requested by LLNL for reimbursement in the False Claims Act case brought against it by Donald Patrick Adrian?
 - b) How much has DOE agreed to reimburse LLNL for this case?
 - c) How much has DOE refused to reimburse LLNL for this case? Has the lab paid these costs itself? Are there additional costs incurred by LLNL in this case that it did not request reimbursement for, and if so, how much was incurred by the lab?

Thank you for your timely cooperation in addressing these important issues. Please provide your response no later than close of business on April 16, 2004. If you have any questions, please contact Dr. Michal Freedhoff of my staff at 202-225-2836.

Sincerely,


Edward J. Markey
Member of Congress

Office of the President

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Contract Compensation

Overview

The cost to the federal government of operating the three UC-managed laboratories totals between \$2 billion and \$2.5 billion per year. Of that, UC receives \$25 million annually in compensation unrelated to the direct operating costs of the laboratories.

Components of compensation

Indirect costs \$11 million

The \$11 million total is placed in the General Fund of the university in accordance with an agreement between the university and the State of California for expenditures university-wide. This agreement was arrived at by considering all fees and indirect costs collected from federal contracts and grants of the university. It is intended to offset: 1) expenditures which California state taxpayers would otherwise incur to support university administration; and 2) support of all federal contracts and grants activities.

Program performance fee

This is an adjustable fee of approximately \$14 million. It funds research at the laboratories to the extent that this funding is not required for risk management costs. This is designed to provide a reasonable level of protection for the assets of the university and the State of California, in recognition of the university's role as a not-for-profit laboratory operator.

In effect, this fee serves as an "incentive fund" for effective management. All funds not withheld or disbursed for potential or actual unallowable costs are returned to the laboratories for research and development activities, particularly those directed toward increased collaboration between UC campuses and the laboratories. A portion of this fee (\$3 million) provides for academic activity considered to be "complementary and beneficial" to both the university and DOE; this includes a variety of institutes and programs for UC students and research fellowships for faculty and graduate students.

Laboratory Management Office

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The costs of the UC Laboratory Management Office, estimated at \$5 million a year, are direct costs of laboratory operations. To date, these costs have not exceeded \$4 million per year.

Additional points

- The overall size, scope, and complexity of the three UC-managed laboratories are far greater than those of laboratories managed by any other not-for-profit operator.
- The nature of the work at the Livermore and Los Alamos laboratories inherently carries a greater potential for liability than would be the case for other not-for-profit contractors.
- The UC contracts were the first negotiated by DOE to include the potential for contractor liability under the Major Fraud Act. The university is also exposed to liability under the False Claims Act.

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Webmaster: Rick Guthrie
UC Laboratory Management Office
(510) 987-0570
rick.guthrie@ucop.edu

Communications Liaison: Chris Harrington
UC Laboratory Management Office
(202)974-6314
Chris.Harrington@ucdc.edu

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